COMMUNIQUÉ PLUS
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* *Slater Report*

The Slater Report of the Ontario Task Force on Insurance covers 254 pages plus a second volume of as many pages of appendices.

The American experience of high and mounting damage awards is seen as precipitating a crisis in the availability of insurance and particularly liability insurance.

Typical reactions in the United States to this situation are to put a cap on awards for intangibles such as pain and suffering and on punitive damages; to abolish joint and several liability, the recovery of collateral benefits and to regulate the contingent fee system.

Marked differences in the situation in Canada as compared to the United States are noted. Here, cases are decided mostly by judges rather than juries; the Supreme Court of Canada has limited awards for pain and suffering to $100,000 in 1978 dollars; punitive damages are rarely awarded and contingent fees, which are prohibited in Ontario, are closely controlled in the provinces where they are permitted. In Canada it is not so much the size of awards that contributes to the insurance crisis but rather the extension of liability.

Certain proposals are made to reform the tort system, such as to have pre judgment interest for non-economic losses in personal injury cases not begin to run until sufficient medical information is provided to the defendant or the plaintiff has made himself available for medical examination; allow courts to impose a "structured judgment" instead of a lump sum, so as to avoid the uncertainties associated with grossing up; abolish the joint and several liability doctrine so that joint tort feasors would be liable only in proportion to their degree of responsibility; to amend limitation legislation so that the period for all professionals would run from the date of the last professional service; consider enacting Good Samaritan legislation under the standard policy.

The tort system, however, is not seen as salvable, even in a reformed state. It is regarded as "akin to a lottery", and a study is quoted as concluding that "if you sat down to design a system for wasting and dissipating precious medical and insurance resources, you could not do any better than what we have now". Another study is referred to which concluded that "the current tort system is on most criteria, an abject failure".

The Report suggests that the fundamental solution lies in recognizing that compensation and deterrence must be separated and that the compensation job must be done through a more efficient and equitable first-party no-tort accident insurance system. The design of the new system, it urges, should proceed on a no-tort basis, and though compensation would be on a no-fault basis, fault would remain to found what is called "a more refined and rigorous penalty-rating" mechanism. The delivery of the system, it adds, should remain primarily in the hands of the private insurance industry "at least so long as private insurance can demonstrate that it has the financial capacity to design and administer such a scheme at affordable premium levels".

The Task Force proposes a three stage plan; in the short term, accident compensation at least for car accident injury, implemented through the private insurance industry; in the medium term, government, working with the private insurance industry, would design a universal accident compensation plan to cover all accidental injuries; long term, federal and provincial governments would co-ordinate and rationalize all first-party no-tort compensation schemes into a universal disability compensation program.

The Task Force's terms of reference come from the Minister of Consumer and Commercial Relations and are to seek out "solutions for cost and capacity problems in the property and casualty insurance industry in Ontario". They are seen by the Task Force as justifying governmental interest in the availability, reliability and affordability of insurance, and in the operations of the insurance market place. The terms of reference are, presumably, seen as broad enough to warrant the recommendations respecting a universal program of disability compensation for all of Canada.

The recommendation that the Government of Ontario consider "elimination of resort to (the) tort/litigation system with respect to personal injury compensation from automobile accidents" may affect profoundly the services lawyers are able to provide to members of the public, and the constraints within which they would have to work.

It is expected that the Special Committee will report to Convocation in June.

Professional Standards Committee

Incompetence, or a failure to meet acceptable standards of practice has long been recognized as a specie of professional misconduct and properly the subject of discipline proceedings. What distinguishes it however is that such misconduct does not involve dishonesty or a lack of integrity. Rather than malfeasance it is misfeasance either through ignorance of law or a simple inability to provide legal services in an efficient and effective way. Formal discipline measures are not well suited to the problem. A new and different system is needed to identify and then deal with such cases in a non-adversarial way with a view to re-training rather than punishing.

Certain recurring characteristics help to identify members who should have the opportunity to proceed under the new system; often there has been a series of complaints about a solicitor's competence extending over a period of time and in some instances there have been appearances before the Discipline Committee based on similar complaints. Very often the same members have failed to comply with filing requirements or to reply promptly to enquiries by clients or by the Society. Reprimands, or even suspensions have failed to bring about improvement. An examination of cases in the Society's records indicate that a common basic cause of complaint stemmed from an attitude that the practice of law is a business rather than a profession and from a failure properly to staff and organize to provide prompt and efficient service particularly in a high volume practice.

The Society has no power at present to conduct random inspections of members' practices or to order intensive peer review sessions for those requiring it. It can, however, use the record of recurrent complaints from members of the public, judges and other lawyers, and the incidence of multiple errors and omissions claims as well as more impressionistic information gathered by audit staff during the course of random inspections of members' books and records. The new Committee will establish criteria and procedures by which these sources of information can be used and will develop ways to secure a member's cooperation in a comprehensive assessment of abilities and practices and then devise a broad range of remedial steps intended to overcome the deficiencies that have led to incompetence in practice. Those who refuse such cooperation would be referred to the normal discipline process along with those who might breach undertakings given to the Professional Standards Committee. The Committee's work will lead to the creation of specific courses for law schools, the Bar Admission Course or Continuing Legal Education designed to provide remedies in areas that require it. In time the proposed program will lead to the formulation and publication of minimum standards of practice in appropriate branches of the profession.

The Professional Standards Committee will solicit the voluntary participation of members of the Society throughout the province to serve as mentors in the remedial process to work under the direction of the Society's Practice Advisory Service. The cooperation of local law associations, the Advocates' Society, and the Canadian Bar Association-Ontario, will be sought to help find the volunteers who would like to make a contribution in this program.

Members may obtain a copy of the full report by writing to the Society, attention Margaret Angevine.

* *Classes of Membership*

The Committee that considered this question had before it an analysis of the membership showing that of 12,399

members in private practice, 3,954 are sole practitioners; 4,279 are partners in firms; 2,310 are employed and 856 are described as associates. Members of the Society not engaged in practice include 209 engaged in education, 1,485 employed in government with 1,625 in the residual category of "other". 2,023 members are neither practising nor employed of whom 1,263 are retired and 760 live outside Ontario. Those three broad categories comprise the 17,741 members as of December 31st, 1985

The Committee considered correspondence from members, most of whom strongly supported the concept of inactive membership. Data from other provinces that have an inactive category of membership paying a reduced fee was also considered together with the earlier report on classes of membership by a sub-committee of the Finance Committee in 1984.

The Committee gave close attention to a submission dated March 26th, 1986 from the Canadian Bar Association-Ontario and considered carefully the views expressed in that report.

The Committee concluded and Convocation accepted its conclusion that the right to practise law carries with it the responsibility to support the duties that rest on the governing body and that those members who do not wish to bear that responsibility may resign their membership and later apply for readmission. Student members may defer their call to the Bar; they must complete the Bar Admission Course within 5 years of obtaining the approved LL.B. degree. All members benefit from membership in a professional body which enhances the standing of its members by the enforcement of the standards of the profession and the fact that some members make less use of their membership rights is not relevant; they have equal rights and therefore should have equal responsibilities. A reduction in the number of members paying fees and levies would have to be reflected in increased fees payable by the remaining members. To accede to the suggested changes would involve a potential loss of income to the general fund and compensation fund of over a million dollars.

So far as ability to pay is concerned, a greater burden is carried by thousands of younger practitioners than by employed members for they have no assurance of regular income as they develop their practices and meet their overhead and other obligations depending for their income on the vagaries of the economy and clients. This, however, is their choice just as secure employment is the choice of others. It is true that the compensation fund levy is borne by practitioners and non-practitioners alike but non-practitioners, including one in government employment, have caused losses to the fund. Continuing Legal Education is financed by the members who use it; the Bar Admission Course and Practice Advisory Service are funded through fees and levies not paid by non-practising members.

Kenneth Jarvis,
Secretary.